

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
GREENVILLE DIVISION

CEOLA WIMBLEY, INDIVIDUALLY  
AND ON BEHALF OF HEIRS OF  
ROLAND WIMBLEY, DECEASED

V.  
JESSIE J. MATHIS AND  
RUSHING ENTERPRISES,  
AN ALABAMA CORPORATION

NO. 4:93CV208-B-D

MEMORANDUM OPINION

This cause comes before the court on the defendants' motion for partial summary judgment. The court has duly considered the parties' memoranda and exhibits and is ready to rule.<sup>1</sup>

I. FACTS

The complaint alleges a wrongful death cause of action arising out of an automobile accident. The plaintiff seeks recovery of actual and punitive damages against both defendant Mathis, the driver involved, and his employer, defendant Rushing Enterprises. The complaint alleges that the defendants breached their duties to keep the vehicle driven by Mathis under proper control, to keep a proper lookout ahead, to obey the stop sign at a highway intersection, to yield the right of way to the deceased, and to operate the vehicle driven by Mathis in accordance with Miss. Code

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<sup>1</sup> Neither the motion nor the response was timely filed. Since the motion was filed only one day late, pursuant to computation under Rule 6 of the Federal Rules of Civil Procedure, and the movant has submitted a rebuttal to the plaintiff's untimely response, the court finds that neither the motion nor the response should be stricken.

Ann. §63-3-601 et seq.

The following facts are undisputed. On March 30, 1993, Roland Wimbley was operating a 1987 Toyota pickup truck in a southerly direction at the intersection of Mississippi Highway 3 and Mississippi Highway 82 in Sunflower County, Mississippi, and defendant Mathis was operating a 1992 Ford van in a westerly direction at the intersection of Mississippi Highway 3 and Mississippi Highway 82 in Sunflower County, Mississippi. Mathis was driving while in the course and scope of his employment. A collision between the Wimbley and Mathis vehicles occurred in the intersection at 3:53 p.m. in daylight without any visual impairment. Mathis did not notice the stop sign or the flashing lights at the intersection; the intersection was not cluttered with any trees or other obstacles. Mathis proceeded through the intersection without stopping and struck Wimbley's truck that had stopped at the stop sign for southbound traffic and had begun traveling through the intersection. Mathis was not familiar with his travel route.

Mathis testified in his deposition that he was traveling at a maximum speed of 50 mph. The plaintiff's accident reconstruction expert is of the opinion that Mathis was traveling at approximately 81 mph. In his employment Mathis regularly works at night, rests and\or sleeps during the morning and day and then travels to the next destination. He had worked the night before the accident and slept eight hours the morning of the accident. He testified in his deposition that he had no alcoholic beverages during a 24-hour

period. At the time of the accident, Mathis was 67 years old and was taking medication for high blood pressure. He testified that he had not had an eye examination in fourteen years but had not experienced any eyesight problems. He had a valid driver's license with no restrictions.

## II. LAW

The defendants move for partial summary judgment on the punitive damages claim against both defendants. The defendants contend that neither Mathis nor Rushing Enterprises engaged in any conduct that warrants punitive damages and that Rushing Enterprises cannot be held vicariously liable for punitive damages. The plaintiff contends that there is substantial evidence that Mathis was grossly negligent and that, based on the doctrine of respondeat superior, Rushing Enterprises is liable for Mathis' gross negligence committed during the course and scope of employment, including any punitive damages assessed against Mathis. The plaintiff further contends that a jury may reasonably conclude that Rushing Enterprises is directly liable for punitive damages on the grounds that Rushing Enterprises was grossly negligent or reckless in employing Mathis as a driver and scheduling him to work at night. The threshold issue is whether Mathis' driving behavior meets "the standard of conduct prerequisite to a punitive damage award." James W. Sessums Timber Co. v. McDaniel, 635 So.2d 875, 879 (Miss. 1994).

Miss Code Ann. § 11-1-65 reads in pertinent part:

(1) In any action in which punitive damages are sought:

(a) Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.

(Emphasis added). The plaintiff cites McDaniel for the proposition that punitive damages are available for the violation of statutory duties. In McDaniel, a truck driver caused the plaintiff's eye injury while operating a log truck pulling a trailer load of logs in excess of the statutory length. 635 So.2d at 876. In addition, the driver was intoxicated in violation of Miss. Code Ann. § 63-11-30 which reads in pertinent part:

(1) It is unlawful for any person to drive or otherwise operate a vehicle within this state who...has ten one hundredths percent (.10%) or more by weight volume of alcohol in the person's blood....

The Mississippi Supreme Court has stated:

Although intoxication within itself is not the ultimate question in a culpable negligence suit, it may be considered as an element constituting gross and careless disregard for the value of human life.

McGrew v. State, 469 So.2d 95, 97 (Miss. 1985) quoted in McDaniel, 635 So.2d at 879. The court noted that the driver in McDaniel had a blood alcohol content level of .24% at the time of the collision which "necessarily impaired his driving ability, and contributed to the collision. Id. Finding no error in the jury instructions on the punitive damages issue, the court stated:

We do...express our regard for the established social policy prohibiting one from driving a vehicle on our public highways while in an

intoxicated condition.

Id. at 879-90. The court finds that McDaniel is clearly distinguishable from the facts of the instant case.

The defendants assert that there is nothing to suggest that Mathis' eyesight, age, or unfamiliarity with the travel route caused the accident. The defendants further assert that Mathis' speed, even assuming that he was traveling at 81 mph, and his failure to see the flashing lights and stop sign do not exhibit

some element of aggression or some coloring of insult, malice or gross negligence, evincing ruthless disregard for the rights of others, so as to take the case out of the ordinary rule.

Continental Southern Lines, Inc. v. Lum, 182 So.2d 228, 232 (Miss. 1966) (quoting Fowler Butane Gas Co. v. Varner, 141 So.2d 226, 233 (Miss. 1962)). In Continental Southern Lines, Inc., the court held that the punitive damages claim should not have been submitted to the jury where a bus driver drove away from the scene of the accident. 182 So.2d at 232-33. The Mississippi Supreme Court has held that unlawfully passing a school bus with the required stop sign and blinking lights and knocking a child into the air was not "a case for the imposition of punitive damages":

Smith was not guilty of willful or intentional wrong, and we do not think that his course of conduct was such as discloses a reckless indifference to the consequences of his act without any substantial effort to avoid the accident.

Seals v. St. Regis Paper Co., 236 So.2d 388, 392 (Miss. 1970). In Morris v. Huff, the court found that punitive damages were not appropriate where the defendant log truck driver's alleged speed,

failure to apply the brakes and failure to reasonably turn his truck away from the plaintiff's oncoming vehicle resulted in a collision on a narrow country road. 117 So.2d 800, 801 (Miss. 1960). The court finds that Mathis' alleged carelessness and excessive speed do not constitute such "gross negligence which evidences a willful, wanton or reckless disregard for the safety of others." The court further finds that the factors of Mathis' age, unfamiliarity with the route, and his work schedule do not raise an issue of material fact as to the punitive damages claim against Mathis.<sup>2</sup>

There is no genuine issue of material fact precluding partial summary judgment on the punitive damages claim against Mathis. Therefore, the court need not address the issues of vicarious or independent liability for punitive damages on the part of Mathis' employer, Rushing Enterprises. Since no punitive damages can be assessed against Mathis for his driving behavior, Rushing Enterprises cannot be held liable for punitive damages.

### III. CONCLUSION

For the foregoing reasons, the defendants' motion for partial summary judgment should be granted. An order will issue accordingly.

THIS, the \_\_\_\_\_ day of December, 1994.

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<sup>2</sup> Absent any evidence that Mathis had eyesight problems, the fact that Mathis had not had an eye examination in 14 years is not material to the issue of gross negligence or reckless disregard for the safety of others on the part of Mathis.

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NEAL B. BIGGERS, JR.  
UNITED STATES DISTRICT JUDGE